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10
11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 JASON EDWARD THOMAS
CARDIFF,

17 Defendant.

Case No. 5:23-CR-00021-JGB

REPLY MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS
INDICTMENT BASED ON DOUBLE
JEOPARDY

Hearing Date: January 13, 2025

Courtroom: 1

Time: 2:00 p.m.

TABLE OF CONTENTS

1		
2		
3	TABLE OF CONTENTS	ii
4	TABLE OF AUTHORITIES	iii
5	REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS	
6	INDICTMENT BASED ON DOUBLE JEOPARDY	1
7	I. The Government Cannot Deliberately Violate the Doctrine of Separation of	
8	Powers	3
9	II. Decades of Subverting Congressional Intent Cannot Be Ignored or	
10	Overlooked.	4
11	III. <i>Hudson</i> Does Not Apply in This Case.	6
12	IV. The Government’s Reliance on Out-of-Circuit Cases Is Misplaced.	8
13	V. The Separation of Powers Doctrine Controls This Case.	9
14	VI. Conclusion.....	11
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

TABLE OF AUTHORITIES

Case Law

<i>AMG Capital Management, LLC v. FTC</i> , 593 U.S. 67 (2021)	2, 4-6, 10
<i>Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.</i> , 591 U.S. 1 (2020)	3
<i>FTC v. Credit Bureau Center, LLC</i> , 937 F.3d 764 (2019)	7
<i>Hudson v. United States</i> , 522 U.S. 93 (1997)	6-9
<i>Seling v. Young</i> 531 U.S. 250 (2001)	7
<i>United States v. Beszborn</i> , 21 F.3d 62 (5 th Cir. 1994)	8
<i>United States v. H.N. Singer</i> , 668 F.2d 1107 (9 th Cir. 1982)	1
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1963)	3
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	3-4, 11-12

Statutes

FTC Act, 15 U.S.C.	
§ 53(b)	1-2, 10-11
§ 57	2

Other

D. Fitzgerald, The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act 1-2, Paper at FTC 90 th , Anniversary Symposium, Sept. 23, 2004	5, 7, 10
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**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
INDICTMENT BASED ON DOUBLE JEOPARDY**

The Government's opposition memorandum asks the Court to ignore the fact that a government agency deliberately set out to subvert the will of Congress by claiming that courts had implied authority to impose disgorgement and other remedies sought by the Federal Trade Commission despite the fact that Congress expressly denied that authority to the agency. The FTC's deliberate failure to disclose to Judge Otero that Congress denied the authority requested in this case was consistent with its *modus operandi* in numerous cases since the FTC obtained a ruling in *United States v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982).¹

Indeed, the Government does not deny that the FTC concocted a scheme to get courts to approve authority that Congress expressly rejected. The Government claims that the notion that courts were "unwitting dupes" is absurd. Dkt. 153 at fn 2. As set out below, the notion that any court would *knowingly* rule that Congress *impliedly* granted powers authorizing the FTC to seek monetary relief when Congress actually *rejected* that authority defies logic and common sense. It is clear that the FTC did not disclose an accurate legislative history to the district and appellate courts because the vast majority of judges would have ridiculed and peremptorily rejected the FTC's implied authority argument. The Government's attempt to blame the Courts to detect the FTC's false representations regarding Congressional intent underscores the need to deter agencies who believe they can blatantly violate Congressional intent.

The Court does not have to take counsel's word for it. A *unanimous* Supreme

¹ Defendant requests the Court take judicial notice of the FTC's Memorandum in Support of TRO and Preliminary Injunction, which, in pertinent part, states: "Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), gives the district court authority to grant both a permanent injunction against violations of any provisions of law enforced by the FTC and 'any ancillary relief necessary to accomplish complete justice,' including an *ex parte* temporary restraining order, a preliminary injunction, an asset freeze, and the appointment of a receiver." Civil Case 5:18-2104, Dkt. 5 at 21-22.

1 Court in *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021), found that
2 Congress never intended to grant the authority arrogated by the FTC. The Government
3 conspicuously fails to address the fact that Justice Breyer made it clear that the FTC's
4 misuse of Section 13(b) upset the legislative compromise reached by Congress
5 limiting the FTC's authority. Nor did the Government address the fact that its conduct
6 violated the basic constitutional principle of separation of powers—Congress makes
7 the law and the Executive branch is entrusted to faithfully execute the laws passed by
8 Congress.

9 The Government similarly failed to address Defendant's argument that the
10 Government's use of Section 13(b) was *void ab initio*. Dkt. 153 at 14. The district
11 court made it clear that the TRO and the Preliminary Injunction was based solely on
12 Section 13(b). "This Court has authority to issue this Order pursuant to Section 13(b)
13 of the FTC Act, 15 U.S.C. § 53(b), Federal Rule of Civil Procedure 65, and the All
14 Writs Act, 28 U.S.C. § 1651." The Court did not cite to or rely on Section 19 of the
15 FTC Act or ROSCA as authority for granting relief, but relied solely on Section 13(b).

16 While the Government seeks to distract the Court's attention claiming that the
17 district court could subsequently rely on monetary remedies under Section 19, the
18 Government cannot breathe life into actions that are *void ab initio*. It is well
19 established that a statute that is *void ab initio* renders any action taken under the
20 authority of that statute to be a nullity and of no effect.² Stated differently, a
21 government agency cannot lawfully seek to confiscate property under a statute that
22 was never intended to grant such draconian authority to the Government. Nor can
23 judicial decisions imply authority where none ever existed and where such authority
24 was expressly denied by Congress. Deliberate misconduct by a government
25

26 _____
27 ² In *Barr v. Am. Ass'n of Political Consultants*, 591 U.S. 610, 631 (2020), the court
28 reiterated that an unconstitutional amendment is a nullity, powerless to change a valid
original statute.

1 misconduct cannot be condoned or tolerated where, as here, the agency set out to
2 violate Congressional intent. The taking of all Defendant's assets and property based
3 on an invalid statute was therefore unlawful punishment.

4 The question before this Court is whether the Government should be rewarded
5 for violating constitutional provisions prohibiting the Executive branch from
6 exercising authority not granted by Congress. Defendant respectfully submits that
7 the Indictment should be dismissed because the FTC and other Government agencies
8 must be deterred from the same or similar conduct in the future. See *Youngstown*
9 *Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Dep't of Homeland Sec. v. Regents*
10 *of the Univ. of Cal.*, 591 U.S. 1 (2020); see also *Wong Sun v. United States*, 371 U.S.
11 471 (1963) (principle of deterrence of official misconduct).

12 **I. The Government Cannot Deliberately Violate the Doctrine of**
13 **Separation of Powers**

14 The checks and balances provided by constitutional separation of powers has
15 been one of the keys to successful government in the United States of America. It is
16 one thing for an agency to err by misinterpreting a statute. It is quite another,
17 however, for agency officials to deliberately set out to arrogate power that was denied
18 by Congress.

19 To preserve individual liberty, the Framers sought to ensure that a separate and
20 independent branch of the Federal Government would exercise each of government's
21 three basic functions: legislative, executive, and judicial. While the text of the
22 Constitution does not expressly refer to the doctrine of separation of powers, the
23 Nation's Founding document divides governmental power among three branches by
24 vesting the Legislative Power of the Federal Government in Congress; the Executive
25 Power in the President; and the Judicial Power in the Supreme Court and any lower
26 courts created by Congress.³ The Court has held that the Constitution does not require

27 _____
28 ³ Article II's Vesting Clause, states that the executive power shall be vested in a

1 a hermetic sealing of the three branches, but “[W]hile the Constitution diffuses power
2 the better to secure liberty, it also contemplates that practice will integrate the
3 dispersed powers into a workable government. It enjoins upon its three branches
4 separateness but interdependence, autonomy but reciprocity.” *Youngtown Sheet and*
5 *Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. Concurring).

6 The Supreme Court has provided an analytical framework for determining what
7 happens when the Executive branch violates fundamental principles of separation of
8 powers. In *Homeland Security*, the Court held that DHS can only exercise the
9 authority Congress chose to delegate and could not lawfully arrogate power through
10 executive order to grant authority for Deferred Action for Childhood Arrivals
11 (“DACA”) not granted by Congress. Similarly, in *Youngstown Sheet & Tube Co. v.*
12 *Sawyer*, the Court held that the Executive branch could not seize steel factories to
13 assure adequate steel production during the Korean War. The principle in both cases
14 was that the Executive branch cannot simply seize and exercise powers not granted
15 by Congress.

16
17 **II. Decades of Subverting Congressional Intent Cannot Be Ignored or**
18 **Overlooked.**

19 The Supreme Court’s oral argument underscored the absurd position taken by
20 the FTC in *AMG*. Justice Breyer made it clear that the FTC’s conduct upset the
21 legislative compromise reached by Congress in refusing to grant broad remedial
22 powers to seek monetary relief and confirmed “your fears, business community, were
23

24 _____
25 President of the United States of America; Article II’s Appointments Clause, addresses
26 the respective roles of the President and Congress in the appointment of federal
27 officials; Article III’s Vesting Clause, states that [t]he ‘judicial Power of the United
28 States, shall be vested in one supreme Court, and in such inferior Courts as the
Congress may from time to time ordain and establish . . .’; and Article III, Section 2’s
Case or Controversy Clause, which limits the jurisdiction of the federal courts.

1 absolutely right.”⁴ Dkt. 137-2 at 451. Justices Sotomayor, Kagan and Breyer all
2 expressed concern that the FTC was circumventing the administrative process
3 established by Congress. Dkt. 137-2, at 429, 450 and 461. Justice Alito noted that
4 the FTC “looked for a workaround” and the Commission’s attorneys were surprised
5 that they succeeded through use of Section 13(b). *Id.* at 455. Justice Kavanaugh stated
6 that the text of the FTC Act was the FTC’s problem: “And in that sense, this case
7 really is a separation of powers case.” *Id.* at 465-66.

8 The Government does not dispute that agency officials set out to subvert
9 Congressional intent by misusing Section 13(b) to seek monetary relief. Dkt. 153.

10 The Government does not dispute that the article posted by the FTC’s David
11 Fitzgerald on the FTC’s website shows that agency officials knew that Congress did
12 not approve broad authority under Section 13(b) to impose consumer redress, but
13 deliberately came up with a plan to get courts to grant that authority. The Supreme
14 Court relied on Fitzgerald’s article to provide the Agency’s internal deliberations and
15 intent to obtain authority denied by Congress.⁵ *AMG*, 593 U.S. at 73, 78. As detailed
16 in Defendant’s initial memorandum, Fitzgerald set out key facts that establish agency
17 misconduct at its worst. Dkt. 135 at 12-13.⁶ For purposes of this motion, the Court

18 _____
19 ⁴ Congress was concerned about granting the FTC’s request for broad powers to seek
20 consumer redress. Senator Hruska criticized a draft bill permitting consumer redress
21 stating that it sought a comprehensive and far-reaching restructuring of the FTC’s
22 functioning its mission, its procedures as well as its jurisdiction Beales, Murriss,
23 *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79
24 *Antitrust Law Journal* 1, 9 (2013) Senator Dole believed that the bill “would create
25 many more problems than it would solve. It is language that is extremely vague and
26 does not define those acts or practices upon which recovery may be had. *Id.* at fn. 35.

25 ⁵ D. Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section*
26 *13(b) of the FTC Act 1-2, Paper at FTC 90th, Anniversary Symposium, Sept. 23, 2004*
27 *(“Fitzgerald”)*

28 ⁶ One must ask whether the Ninth Circuit would have decided *H.N. Singer* on implied
authority in 1982 if Mr. Fitzgerald had provided the *Singer* Court with the information

1 must accept these undisputed facts as true.

2 Moreover, the case before the *AMG* court did not present an issue of whether
3 the FTC acted in bad faith or whether agency officials *deliberately* violated
4 constitutional principles of separation of powers.⁷ Thus, while there were no findings
5 of bad faith in *AMG*, the oral argument and unanimous opinion of the Court support
6 a finding of bad faith and deliberate misconduct by agency officials in this case.

7 **III. Hudson Does Not Apply in This Case.**

8 The Government relies on *Hudson v. United States* for the proposition that
9 Defendant's prosecution this case is not barred by the Double Jeopardy Clause of the
10 Fifth Amendment. Simply stated, *Hudson* did not involve an independent violation of
11 the Constitution's separation of powers doctrine. The Court, in *Hudson*, was not faced
12 with a violation of the separation of powers doctrine and did not address the issue.
13 Thus, the Court should not utilize the *Hudson* analysis where, as here, the Executive
14 branch violated the separation of powers doctrine. Indeed, the Court must first
15 determine whether action taken by the FTC violated the separation of powers doctrine.
16 If so, *Hudson* does not apply.

17 The Government correctly observes that *Hudson* sets out an analytical
18 framework analyzing Congressional intent. The Government would have this Court
19 analyze the first part of the *Hudson* test: whether the legislature, in establishing the
20 penalizing mechanism, indicated either expressly or impliedly a preference for one
21 label or the other. Dkt. 153 at 16. The problem is that the FTC's substituted its own
22

23 he disclosed decades later in his 2004 article? Clearly, the Supreme Court
24 *unanimously* rejected implied authority under Section 13(b) where, as here, the text
25 of the statute did not permit such a reading.

26 ⁷ One of the issues presented in *AMG* was whether Section 13(b) providing for
27 injunctive relief implicitly allowed the FTC to seek monetary authority. The Court
28 rejected notion that a provision's grant of an injunction or other equitable powers does
not automatically authorize a court to provide monetary relief. See *AMG*, at 80.

1 policy preferences for that of Congress and failed to disclose the fact that Congress
2 rejected the FTC’s request for monetary authority under Section 13(b). The Seventh
3 Circuit noted that prior decisions in the Seventh Circuit and other circuits interpreting
4 Section 13(b) “uncritically accepted” the FTC’s position that Section 13(b) provided
5 for monetary relief.⁸ *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764,785 (2019)
6 Clearly, the Seventh Circuit diplomatically recognized that the circuits had simply
7 adopted the FTC’s strategy, as described by Fitzgerald, without “critically” examining
8 the statute’s text, structure and legislative history. The FTC appealed *Credit Bureau*
9 *Center* with *AMG* and the Supreme Court unanimously rejected the FTC’s argument
10 holding that Congress never intended to provide broad monetary redress through
11 Section 13(b).

12 The Court, in *Hudson*, did not address how double jeopardy should be
13 addressed where, as here, the Government deliberately violated the separation of
14 powers doctrine. The Government’s argues that the civil nature of a statute is not
15 altered by the way an agency implements or intends to implement a statute because
16 “[h]arsh executive implementation “cannot transform what was clearly intended as a
17 civil remedy into a criminal penalty. Dkt. 153 a 15 citing *Seling v. Young* 531 U.S.
18 250, 269 (2001) (concurring opinion). In *Seling*, the Court considered whether a civil
19 commitment statute violated double jeopardy and rejected the argument that a
20 respondent could raise an “as-applied” challenge to the Act on double jeopardy
21 grounds. *Id.* at 262. In that case, sexually violent prisoners were held in a segregated
22 unit within the prison system “The civil nature of a confinement scheme cannot be
23

24 ⁸ See e.g. *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984 (per
25 curiam); *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014), *FTC v. Freecom Communications,*
26 *Inc.*, 401 F.3d 1192, 1203 fn 6 (10th Cir. 2005) (same), *FTC v. Bronson Partners, LL*,
27 *654 F.3d 359,365* (2d Cir. 2011) (same); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931
28 *F.2d 1312, 1314-1315* (8th Cir. 1991); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d
1, 15 (1st Cir. 2010).

1 altered based merely on vagaries in the implementation of the authorizing statute.”
2 *Id.* at 263. Unlike *Seling*, which involved a statute with authority to act, this case
3 involves a statute that did not authorize the FTC’s seizure of property. Simply stated,
4 applying *Hudson* would allow other governmental agencies, to overreach their
5 authority and engage in misconduct without consequence or accountability.

6 **IV. The Government’s Reliance on Out-of-Circuit Cases Is Misplaced.**

7 The Government cites out-of-circuit cases absolving the Government of
8 misconduct based on the clean hands doctrine. Dkt. 153 at 13. The Government cites
9 the criminal prosecution of Michael Brown following a civil case filed by the FTC.
10 The key difference between Brown and this case is that Brown relied on the analysis
11 set out in *Hudson v. United States*, 522 U.S. 93 (1997) and did not raise a challenge
12 to his prosecution based on constitutional separation of powers citing the *Homeland*
13 *Security* and *Youngstown Steel* decisions. Neither the district court nor the appellate
14 court in *Brown* found that the FTC did not *deliberately* set out to misuse Section 13(b)
15 after Congress denied the FTC’s request for broad remedial relief.

16 Essentially, these decisions concluded that, because there was long standing
17 precedent allowing the FTC to seek restitution using Section 13(b), the agency could
18 not be found to have acted in bad faith for seeking a remedy approved by existing
19 law. *Id.* at fn. 2-3. The question in this case is whether actions taken by the
20 Government that deliberately violate constitutional separation of powers can be
21 tolerated in a society governed by rules set out in the Constitution.

22 The Government also asserts that the FTC could not be held accountable for
23 actions undertaken by a Receiver. Dkt. 153 at 21 citing *United States v. Beszborn*, 21
24 F.3d 62 (5th Cir. 1994). In *Beszborn*, defendant was indicted in 1988. *Id.* at 67. Two
25 years later, the Resolution Trust Company was appointed to step into the shoes of a
26 banks assuming all debts of the bank and ultimately obtained damages. *Id.* at 68. The
27 Court found that the unique role of the RTC was created to aid in the management of
28

1 a failed institution prior to its complete sale and dissolution for the benefit of creditors.
2 Significantly, the Government in this case obtained a receivership by violating
3 constitutional separation of powers. The FTC specifically asked the Court to appoint
4 a receiver for the purpose of seizing Redwood's and Cardiff's assets knowing that
5 Cardiff would suffer devastating losses through an unauthorized receivership. In
6 essence, the Government is saying that an agency can set out to violate separation of
7 powers but then defend on the basis that the FTC did not directly seize the Defendant's
8 property and is therefore innocent of wrongdoing.⁹

9 The Receiver's actions inflicted devastating financial and personal harm on Mr.
10 Cardiff, including the loss of his home, the destruction of his credit, and the inability
11 to meet basic obligations for his family. **Exhibit B**, Declaration of Jason Cardiff ¶¶
12 8-12 (hereafter "Cardiff Dec."). Moreover, the Government confiscated funds earned
13 by Cardiff while employed at VPL Medical, a company manufacturing surgical
14 quality face masks during the pandemic. VPL was created while Cardiff was in
15 receivership after notice to the FTC. Civil Dkt. 389. These funds were unrelated to
16 Mr. Cardiff's operation of Redwood, which were under the control of the Receiver.
17 The Government points out that Defendant made requests for living expenses, some
18 of which were granted and some denied. Absent Congressional authority, the
19 Receiver's actions must be characterized as punitive rather than remedial.

20 **V. The Separation of Powers Doctrine Controls This Case.**

21 The Government asserts that the FTC did not take over Defendant's company
22
23

24 ⁹ The FTC asserts that assets and receiverships are the court's tools ancillary to the
25 injunctive relief. Dkt. 153 at 8 *citing SEC v Pukke*, 2024 WL 5082066 (4th Cir. Dec.
26 12, 2024). However, *Pukke* involved a court imposing a receivership, not under
27 Section 13(b), but to compel defendants to pay a \$120.2 million contempt sanction
28 under the Court's contempt powers. Section 13(b) authorized a preliminary injunction
restraining Mr Cardiff from business activities violating the injunction, but the assets
were not properly placed in receivership.

1 on its own or under its own authority. Dkt. 153 at 25. The FTC does not (and cannot)
2 deny that it misrepresented its authority under Section 13(b) to Judge Otero and
3 numerous other district and appellate courts:

- 4 1. The Supreme Court's opinion in *AMG* made it clear that Congress never
5 intended to grant broad authority to seek monetary redress under Section
6 13(b);
- 7 2. Congress rejected the FTC's request for broad monetary relief---a fact that
8 would have *negated* any claim to implied or ancillary authority; and
- 9 3. Fitzgerald's article admitted that the Agency knew that Section 13(b) was
10 solely designed to provide for injunctive relief;

11 Agencies of the Executive branch cannot be allowed to engage in misconduct by
12 affirmatively misleading the Courts as to agency authority.

13 The same stakes are at issue where, as here, the FTC went to court and failed
14 to disclose to Judge Otero that Congress expressly denied the very authority the FTC
15 falsely represented under Section 13(b). Such conduct not only violated Fed. R. Civ.
16 P. 11 but also led the Court to a judicial decision that violated the constitutional
17 doctrine of separation of powers. Any actions taken under such an order are void ab
18 initio.

19 From the inception of this case, the FTC consistently litigated and relied solely
20 on Section 13(b) as its authority for seeking monetary damages and imposing a
21 receivership. It was only after the Supreme Court's unanimous decision in *AMG*
22 *Capital Management, LLC v. FTC*, which held that Section 13(b) does not authorize
23 monetary relief, that the FTC attempted to shift its legal strategy. This post-hoc effort
24 underscores the FTC's deliberate misuse of Section 13(b) and its failure to candidly
25 address the limitations of its authority.

26 The constitutional violation occurred when the FTC falsely asserted that it
27 possessed authority it did not have under Section 13(b) and when the Court, relying
28

1 on those misrepresentations, unlawfully imposed a receivership and froze all of the
2 Defendant's assets. The FTC's belated attempts to reframe its authority cannot cure
3 the void nature of the actions taken under the original flawed order.

4 The proper remedy for an agency's violation of separation of powers in this
5 case is dismissal. The seizure of property in *Youngstown* was condemned by the
6 Supreme Court. Sanctions must be calculated to deter government misconduct. In
7 this case, the agency deliberately set out to exercise the power that Congress refused
8 to authorize. The agency's misconduct lasted almost forty (40) years. When the
9 Supreme Court *unanimously* rejected the FTC's arguments before the Supreme Court,
10 the FTC's Chairperson publicly criticized the Court's for depriving the FTC of an
11 enforcement tool.¹⁰ Clearly, the Chairperson failed to recognize that the agency failed
12 to *faithfully* execute the law passed by Congress. Given the deliberate, numerous and
13 sustained period during which the FTC violated constitutional separation of powers,
14 and the FTC's defiance of the Court's opinion in AMG, any lesser remedy would not
15 deter other government agencies or law enforcement personnel from engaging in the
16 same or similar misconduct.

17 **VI. Conclusion**

18 Engrained in the law is the concept that "No man is above the law." In this
19 case, no agency should be above the law. Lawless conduct by agencies cannot be
20 condoned in a society that depends on executive branch agencies to *faithfully* execute
21 the laws. Public confidence that agencies will not be allowed to subvert the will of
22 Congress is imperative to a democratic society where the people's elected
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24 ¹⁰ "In AMG Capital, the Supreme Court ruled in favor of scam artists and dishonest
25 corporations, leaving average Americans to pay for illegal behavior." April 22, 2021
26 FTC Press Release, [ftc.gov/news-events/news/press-releases](https://www.ftc.gov/news-events/news/press-releases). This sort of rhetoric is
27 inappropriate where, as here, the Agency knowingly overstepped the limits of its
28 authority reflecting a lack of understanding of its limited role to faithfully executing
laws passed by Congress.

1 representatives, not agency officials, make public policy. Any lesser remedy will not
2 deter the Government from engaging in the same or similar conduct going forward.

3 For the above reasons, the Indictment must be dismissed with prejudice.
4

5 Dated: December 30, 2024
6

7 By: /s/ Stephen R. Cochell

8 Stephen R. Cochell

9 Attorney for Defendant

10 JASON EDWARD THOMAS CARDIFF
11

12 **SERVICE LIST**

13 I HEREBY DECLARE THAT THE FOLLOWING COUNSEL HAVE BEEN
14 SERVED WITH THIS DEFENDANT JASON CARDIFF'S NOTICE OF MOTIO
15 AND MOTION TO SUPPRESS EVIDENCE THROUGH THE COURT'S ECF O
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